



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 21, 1998

Mr. Paul Sarahan
Director, Legal-Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-2468

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118961.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all information concerning the Malone Service Company - Swan Lank Plant in Texas City, Texas. You indicate that you will release some of the requested information to the requestor. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You first claim that the information you have submitted as Exhibits C-E are protected from disclosure by section 552.103. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You indicate that after a contested case proceeding, the commission revoked permits issued to the Malone Service Company. The company subsequently appealed the order by filing suit against the commission. *Malone Service Co., Inc. v. Texas Natural Resource Conserv. Comm'n*, No. 97-08229 (261st Dist. Ct., Travis County, Tex., July 18, 1997). We have previously found that you had shown the applicability of section 552.103 for similarly requested information. Open Records Letter No. 98-1511 (1998). We have reviewed the documents and agree that they are related to the

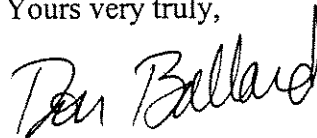
pending litigation. You may withhold the documents contained in Exhibits C-E under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation, e.g. Attachment D-1, is not excepted from disclosure under section 552.103(a), and it must be disclosed. Such information would likewise not fall under the protection of section 552.107 of the Government Code. See Open Records Decision No. 574 at 5 (1990); Tex. R. Civ. Evid. 503(a)(5) (a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also assert that the documents submitted as Attachment F may be protected from disclosure pursuant to section 552.110. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." As provided by section 552.305 of the Open Records Act, this office notified Malone Service Company and Mr. W.J. "Billy" Powell of their opportunity to submit reasons as to why the records at issue should be withheld pursuant to section 552.110. However, this office has received no arguments concerning section 552.110. The applicability of section 552.110 has not been shown in this instance. See Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Attachment F must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

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Enclosures: Submitted documents

cc: Ms. Kimberly Dorion
The Hartford
P.O. Box 3121
Naperville, IL 60566-7121
(w/o enclosures)